

**MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO
REMOVE THE CASE FROM ABEYANCE, GRANT THE COMPANY'S
PETITION FOR REVIEW, DENY THE BOARD'S CROSS-APPLICATION
FOR ENFORCEMENT, REMAND THE CASE TO THE BOARD, AND
DISMISS, OR ALTERNATIVELY, DENY, THE COMMITTEE'S
PETITION FOR REVIEW**

To the Honorable, the Judges of the United States
Court of Appeals for the Seventh Circuit:

The National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, respectfully moves this Court to remove this case from abeyance, and, in light of the Supreme Court’s decision in *Epic Systems Corp. v. Lewis*, No. 16-285, 2018 WL 2292444 (U.S. May 21, 2018), and the Board’s decision in *The Boeing Company*, 365 NLRB No. 154, 2017 WL 6403495 (December 14, 2017), grant the petition for review filed by Hobby Lobby Stores, Inc. (“the Company”), deny the Board’s cross-application for enforcement, and remand the case to the Board. The Board also requests that the Court dismiss or, alternatively, deny the petition for review filed by the Committee for the Religious Right to Organize (“the Committee”). In support of this motion, the Board shows as follows:

1. In the Decision and Order under review, the Board found that the Company violated Section 8(a)(1) of the National Labor Relations Act (“the Act”), 29 USC § 158(a)(1), by maintaining and enforcing an arbitration agreement that required employees, as a condition of employment, to waive their rights to concertedly pursue work-related claims in any forum, whether arbitral or judicial.

363 NLRB No. 195, 2016 WL 3213012, at *1 & n.3, *5. In doing so, the Board applied the rule set forth in *Murphy Oil, USA, Inc.*, 361 NLRB 774 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *affirmed*, No. 16-307 (May 21, 2018).

In finding the maintenance and enforcement violations, the Board did not rely on and did not consider the Committee's proffered alternative legal theories for finding the arbitration agreement unlawful. Specifically, the Board did not rely on the administrative law judge's findings that agreed with two legal theories proffered by the Committee challenging the applicability of the Federal Arbitration Act (FAA). While the judge found, in agreement with the Committee, that the Company failed to show that the arbitration agreement affected commerce within the meaning of the FAA, and that the Company's truck drivers were exempt from the FAA, the Board did not address the validity of those findings. *Id.* slip op. at 10-13. Instead, it explained that it would assume the applicability of the FAA and that such determinations were unnecessary under its *Murphy Oil* rationale, which found no conflict between the FAA and the Board's determination that mandatory class-action waivers are unlawful under the NLRA. *Id.* slip op. at 1, n.3. The Board also rejected, as outside the scope of the complaint, the Committee's

additional alternative legal theories as to why the arbitration agreement was unlawful. *Id.* slip op. at 1, n.2, n.7.¹

The Board separately found, under its analytical framework laid out in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), that the Company violated the Act by maintaining an arbitration agreement that employees would reasonably construe as restricting their right to file unfair-labor-practice charges with the Board. *Hobby Lobby*, 363 NLRB No. 195, slip op. at 1-2, n.3, 14-15. The Board also denied the Committee's request for additional remedies. *Id.* slip op. at 1, 2 n.4.

2. Within ten days after the Board issued its Decision and Order, both the Company and the Committee filed petitions for review. The Company filed a petition for review in the Fifth Circuit challenging the Board's finding of violations, *Hobby Lobby Stores, Inc. v. NLRB*, 5th Cir. No. 16-60312, and the Committee filed a petition for review in this Court, challenging the Board's failure to grant certain remedies, *The Committee to Preserve the Religious Right to Organize v. NLRB*, 7th Cir. No. 16-2297.

¹ The Committee's alternative arguments included that the arbitration agreement interferes with other federal statutes that allow employees to seek relief in group fashion; prohibits representative actions that are governed by non-preempted state law; interferes with Section 7 rights to resolve disputes using other types of concerted activity; violates the Religious Freedom Restoration Act; and is unlawful when considered along with other alleged unlawful policies that the Company maintains and enforces. *Id.* slip op. at 10, n.7.

Pursuant to Section 2112(a)(3), the Board generally is required to notify the judicial panel on multidistrict litigation (the Panel) of multiple petitions for review, and the Panel then randomly selects the court in which the case will be litigated. *See* 28 U.S.C. § 2112(a)(3). Prior to notifying the Panel, the Board moved to dismiss the Committee's petition for lack of jurisdiction, arguing that the petition did not demonstrate that the Committee had the constitutional standing necessary to invoke the Court's jurisdiction. The Board specifically contended that at the time that the Committee filed its petition, it had not shown it had any employees as members and therefore could not show that it suffered any injury in fact from the Board's failure to order additional remedies. *See* Board's Motion To Dismiss (Case No. 16-2297 Docket Entry 4),² p. 4; *see also* Board's Reply to Opposition (Docket Entry 9), pp. 4-9. In opposing the Board's motion, the Committee argued that the jurisdictional issue should not be resolved until the Panel was notified that two petitions for review of the same Board Order were pending in different circuits. *See* Committee's Opposition (Docket Entry 7), pp. 2-3. The Committee contended that after the Panel designated a circuit to hear the petitions, the designated court could decide the Board's motion to dismiss. *Id.*

The Court denied the Board's motion to dismiss and ordered the Board to notify the Panel that two petitions for review had been filed regarding the same

² Herein, all docket entry references are to the lead case, 16-2297.

Board Order. The Court's order did not address the jurisdictional issue raised by the Board. *See* Court Order, Aug. 3, 2016 (Docket Entry 12). The Panel randomly selected this Court to consolidate the two petitions for review. The Fifth Circuit transferred the Company's petition for review to this Court, and the Board cross-applied for enforcement. The Court consolidated the two petitions for review and the Board's cross-application for briefing and disposition.

3. The Company and the Committee filed opening briefs. The Company's brief challenged the three violations found by the Board. *See* Company's Opening Brief (Docket Entry 36). The Committee's brief challenged the adequacy of the remedy. *See* Committee's Opening Brief (Docket Entry 37), pp. 43-44. It also raised its alternative theories challenging the applicability of the FAA to the arbitration agreement and to the truck drivers (pp. 7-20), as well as the additional alternative legal theories for finding the arbitration agreement unlawful that the Board had rejected as outside the scope of the General Counsel's complaint, pp. 20-34. Thereafter, as discussed above, the Court stayed the case pending resolution of *Epic Systems*.

4. On May 21, 2018, the Supreme Court issued its decision in *Epic Systems*, which invalidated the Board's *Murphy Oil* decision, and held that employers may lawfully maintain arbitration agreements that bar employees from

concertedly pursuing work-related legal claims.³ The Board acknowledges that under that decision, the Board's finding that the Company unlawfully maintained and enforced its arbitration agreement is not enforceable. The Court should therefore grant the Company's petition for review and deny the Board's cross-application for enforcement.

However, as discussed in the Board's statement of position filed simultaneously with this motion, *Epic Systems* does not resolve this case. Instead, remand of the maintenance and enforcement issues is necessary for the Board to consider two alternative legal theories for finding the arbitration agreement unlawful that the Committee presented to the Board; specifically, that the Company failed to demonstrate that the arbitration agreement affected commerce within the meaning of the Federal Arbitration Act (FAA) and that the Company's truck drivers were exempt from the FAA. Although the administrative law judge found merit to those two arguments, the Board did not rely on those alternative theories because its *Murphy Oil* rationale rendered such findings unnecessary. Nor did it address or rule on them. *Hobby Lobby*, 363 NLRB No. 195, slip op. at 1,

³ The Court issued *Epic Systems* together with *Murphy Oil*, No. 16-307, and *Ernst & Young LLP v. Morris*, No. 16-300.

n.3.⁴ Likewise, *Epic Systems*, which overturned the Board's *Murphy Oil* rationale, did not address the Committee's alternative arguments. Remand is therefore necessary for the Board to consider these arguments in the first instance. See *NLRB v. Food Store Employees*, 417 U.S. 1, 8-10 (1974) (remand appropriate for Board to consider merits of argument in the first instance); accord *Comm'n Workers of Am., Local 5008 v. NLRB*, 784 F.2d 847, 851-52 (7th Cir. 1986) (where the Board relies on single incorrect ground for a decision, the removal of that ground requires a remand for further consideration).

5. In addition, on December 14, 2017, the Board issued *The Boeing Company*, which “overrule[d] the *Lutheran Heritage* ‘reasonably construe’ standard” and announced a new test to replace it. 2017 WL 6403495, at *2. *Boeing*'s rejection of the “reasonably construe” standard eliminates the Board's rationale for its finding at issue here that the Company's agreement restricts employees' rights to file unfair-labor-practice charges with the Board. Whether the agreement restricts that right under *Boeing*'s framework is a question for the Board to answer in the first instance. Accordingly, the Board respectfully moves this Court to remand that issue to the Board.

⁴ As noted above, p. 4 n.1, the Board rejected, as outside the scope of the complaint, the Committee's additional alternative legal theories as to why the arbitration agreement was unlawful.

6. The Court should dismiss the Committee's petition for review for lack of jurisdiction, or alternatively, deny the petition. As set forth fully in the Board's motion to dismiss the Committee's petition (Docket Entry 4) and its reply to the Committee's opposition (Docket Entry 9), the Committee lacks standing to pursue its claims challenging the adequacy of the Board's remedy because its petition failed to identify, let alone establish, that it or any of its members suffered any injury in fact that can be traced to the Board's Order, and which is likely to be redressed by a favorable decision by this Court. And while the Court denied the Board's motion to dismiss the Committee's petition, the Court did not state whether it denied the motion because it disagreed with the Board's jurisdictional challenge, or whether it agreed with the Committee's position that because two petitions for review had been filed regarding the same Board Order, the Board must notify the judicial panel on multidistrict litigation, regardless of possible jurisdictional infirmities. The Board therefore renews its contention that the Court should dismiss the Committee's petition for lack of jurisdiction.

In the alternative, the Court should deny the Committee's petition as presenting no issues for the Court to consider. Its challenge to the Board's

remedies is without basis now that all alleged violations warrant remand to the Board for further consideration.⁵

WHEREFORE, the Board respectfully requests that the Court enter an order removing this case from abeyance, granting the Company's petition for review, denying the Board's cross-application for enforcement, dismissing or, alternatively, denying the Committee's petition for review, and remanding the case to the Board.

Respectfully submitted,

/s/ Linda Dreeben

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Dated at Washington, D.C.
this 19th day of June 2018

⁵ The Court should also deny the Committee's motion for judicial notice, which the Court had referred to the merits panel for disposition. Given the remand of the unfair-labor-practice issues, the motion is now moot.

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/Linda Dreeben

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Dated at Washington, D.C.

This 19th day of June 2018